In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 752

THE JACOBS INSTRUMENT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the District of Maryland (R. 22–23, 90–136) are unreported. The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. 83–85) is reported at 239 F. 2d 459.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1956 (Pet. 83). The petition for a writ of certiorari was filed on February 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in light of the provisions of the research and development contract between the United States and the petitioner, the United States is entitled to disclosure of recorded technical data prepared by the petitioner in the course of work performed under the contract.

2. Whether the District Court's finding, sustained by the Court of Appeals, that the termination of the contract by the Government was not arbitrary or in bad faith, is clearly erroneous.

3. Whether the amount of termination costs owing to the petitioner was correctly determined by the District Court.

4. Whether, in the circumstances of this case, the District Court abused its discretion in denying petitioner's motion for a "mistrial."

CONTRACT PROVISIONS INVOLVED

Pertinent portions of the contract are set forth in the Appendix, *infra,* pp. 15–18.

STATEMENT

In April 1949, the United States entered into a research and development contract with the petitioner for the development of a bombing system. The contract was terminated by the Navy prior to completion by letter of June 26, 1953, in accordance with Article 23 of the contract (App., *infra,* p. 15), which provided for termination "for the best interests of the Government." The termination was prompted by the inability of the parties to reach agreement with respect to several non-technical matters during the

course of negotiations for curtailing the original scope of the contract because of budgetary limitations (R. 94).

In the letter of termination, the Government called for the return to it of all property to which it was entitled under the contract, including a complete report of all work done, a master index of drawings, and various drawings, notebooks, memos, and studies pertaining to work under the contract (R. 95). Petitioner did not dispute the Government's right to most of the property and he submitted a report of work done and about 1,000 drawings, but he refused to turn over additional technical records and the master index. Negotiations for settlement of these questions continued, and the Government paid monthly termination costs until February 25, 1954, when the contracting officer notified the petitioner that such costs would no longer be allowable and reimbursable. This suit was then instituted seeking an order compelling petitioner to deliver the physical property and recorded data and restraining him from otherwise disposing of them (R. 37–42).

Petitioner denied that he was required to turn over the research data and further contended that the Government's termination of the contract was arbitrary and in bad faith (R. 43–56, 58–86). In addition, he interposed four counterclaims, aggregating approximately $60,000. The first three related to costs of protection and storage of the property and data in dispute, both before and after allowable costs had been terminated by the contracting officer (R. 49–51, 86–87). The fourth counterclaim related to a 1% re-

serve withheld by the Government under the contract (R. 87). The Government denied the court's jurisdiction over the counterclaims and made an oral motion to dismiss grounded on the $10,000 jurisdictional limitation on Tucker Act suits in the district courts.[1]

The District Judge held that, on the basis of the terms of the contract and the law governing the rights of an employer to the inventions of his employee, the Government was entitled to full disclosure of the results of petitioner's research and could examine, copy, and use all of the material, although he was unwilling to agree that the contract gave the Government title to the various drawings and records in suit (R. 101). In addition, the court held that the Government was entitled to immediate possession of the physical property (R. 113) and that petitioner's second defense, that the termination of the contract was invalid, should be flatly rejected (R. 124–31).

Turning to the question of jurisdiction over the counterclaims, the court reviewed the authorities and concluded that jurisdiction was lacking to enter a judgment against the United States on the counterclaims since those claims could not be the subject of an original action in the district court (R. 109–11). But the court went on to impose as a condi-

[1] 28 U. S. C. 1346 (a) (2) provides in pertinent part:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * * * *

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded * * * upon any express or implied contract with the United States."

tion to the granting of equitable relief to the Government the requirement that the Government pay to the contractor the sum of $20,072.91 [2] to which the contractor was found to be entitled on account of the matters involved in the counterclaims.[3] This requirement was embodied in the District Court's final decree of December 29, 1955 (R. 135–36).

On January 25, 1956, approximately four weeks after the final decree was entered, petitioner filed a motion for a "mistrial" on the grounds that he had not been adequately represented by counsel, that certain government exhibits were fictitious or grossly erroneous, and that he had discovered new evidence which would have produced a result favorable to him on the termination question. After hearing, this motion was denied and an order entered to that effect (R. 22–23).

Both sides appealed. Petitioner contested the District Court's ruling with respect to the merits of the Government's claim, the amount determined to be owing to him on his counterclaims, and the denial of his motion for a "mistrial." The Government contended that the District Court could not properly condition the granting of relief to it when to do so involved the adjudication of a contract claim against

[2] This includes the entire amount claimed in the first and fourth counterclaims, a total of approximately $11,600. The rest of petitioner's recovery consists of an allowance of $400 per week for the guarding of the papers and records by Jacobs and his associates after the Bureau of Ordnance cut off termination costs in February 1954.

[3] The Government is now considering whether to file a cross-petition for a writ of certiorari to review this portion of the judgment.

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the United States in excess of $10,000.[4] The Court of Appeals affirmed the District Court's decree in all material respects (Pet. 83–85).

ARGUMENT

The questions raised by the petition relate solely to a determination of certain rights of the parties under the contract here involved and to the factual circumstances surrounding the termination of the contract by the Government. Petitioner is requesting this Court to review the analysis made by both courts below of the applicability to him of particular contract provisions, and the findings of fact made by the District Court, in which the Court of Appeals completely concurred. This is the kind of review this Court has often stated it will not undertake. *Comstock* v. *Group of Investors,* 335 U. S. 211, 214, and cases there cited. No question of general importance or as to which there is a conflict of decision is presented. Furthermore, the results reached by both courts below on the questions raised by the petition are plainly correct.

1. The Government had originally taken the position that under the contract it had title to the various technical documents in question and that these should be turned over to it in original form. The District Court found this to be a "close and doubtful question" (R. 101) and preferred to base its decision on those provisions of the contract which "undoubtedly give the Government the right to examine, study, copy, photograph, and use all of the writings, for any pur-

[4] See note 3, *supra.*

pose covered by the contract" (*ibid.*). Since this satisfied the technical requirements of the Navy, the Government did not further insist on absolute title. The Court of Appeals, without considering necessary an elaborate discussion of the question, agreed that upon termination of the contract the Government was "entitled to the benefit of all knowledge which had been acquired in the progress of the work" (Pet. 84).

The contract provisions on which this right to disclosure is based are reprinted in full in the Appendix (*infra*, pp. 15–18) and can be briefly summarized. Schedule A of the contract, which set forth the scope of the work to be performed, required petitioner to supply to the Navy a set of reproducible drawings of all equipment developed under the contract. Article 17 of the contract required the petitioner to submit to the Navy Bureau of Ordnance, from time to time as requested, progress reports of work being accomplished. These reports were to make "full disclosure of all work done and the results thereof," and the Bureau of Ordnance was "at all reasonable times [to] have full access to the work being performed under this contract." In addition, "[a]t the completion of the task, *or at the termination thereof, if not complete,*" the contractor was to submit a complete report of work done, "together with working drawings and specifications of such prototypes, if any, as may have been developed." (Emphasis added.) Article 23, which gives the Government the right to terminate the contract "for the best interests of the Government," provides that in the event of termina-

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tion the contractor is obligated to transfer title and deliver to the Government "the plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government." And the patent provisions of the contract also indicate that full disclosure was contemplated. The Government was granted a royalty-free license to practice each "Subject Invention," which was defined as each invention, improvement and discovery (whether or not patentable) conceived in the performance of this contract. Furthermore, the Government was granted "the right to reproduce, use and disclose for any governmental purpose, all or any part of the reports, drawings, blueprints, data and technical information to be delivered by Contractor to the Government under this contract; * * *." When these provisions are read together, when it is remembered that this was a contract for research and development and not for manufacture and sale, and when it is considered that there is no provision in the contract in any way limiting the disclosure to be made to the Government in the event of termination, the Government's right to the relief granted by the District Court appears clear.

The Government did not require progress reports from the petitioner to the fullest extent it might have done so under Article 17. As found by the trial court, this was "for the best interests of both the Contractor and the Government, to permit the Contractor to utilize his staff to proceed with the work, rather than to utilize his staff in the preparation of laboratory reports which apparently would have taken as

long to prepare as doing the work—perhaps longer" (R. 99). In addition, when the contract was terminated, the Government did not insist upon literal compliance with the requirements of Article 17 (b) for a final report; it agreed, at the petitioner's proposal, to allow him to submit a summary of work accomplished (R. 99). But this concession to the contractor's lack of facilities and lack of personnel was not intended, nor was it understood by the parties, to constitute a waiver of the Government's right to full disclosure. The District Court's finding in this regard is amply supported by evidence in the record which was reviewed in the court's first oral opinion (R. 100–105). Testimony at the trial established that it was the understanding of the parties that the technical recorded information would be made available and that the final report agreed upon would bridge the gaps in that recorded information. Indeed, that was the very reason for the Government agreeing to accept the short report. The petitioner indicated that he was willing to go along with this procedure, and agreed in his testimony that the report he submitted would not give a working knowledge of the system without supporting data. There is no reason to suppose that the Government, by accepting a shortened report, was at the same time foregoing the benefits of the work already performed under the contract to which it was otherwise entitled and for which it had expended many thousands of dollars.

There is nothing harsh or unusual in the result reached. The property rights which petitioner has in

the "know-how" in question were expressly protected in the court's decree (R. 119), as the Court of Appeals pointed out (Pet. 84). The petitioner was paid to produce this "know-how," and the risk that nothing of value would be developed was borne by the Government. The Government seeks only what it paid for, *i. e.*, the results of the research performed under the contract. The purpose of the contract was the creation of designs and inventions; the Government was not simply purchasing a company's product. Without the technical data in question, continuing work on the development of a bombing system begun here would be seriously hampered and would result in unnecessary duplication of effort and expense. The contract provisions in question were intended to protect the Government in this regard.

2. Petitioner again asserts, as he did before both courts below, that termination of the contract by the Government was arbitrary, in bad faith, and not in the best interests of the Government. Article 23 of the contract authorized termination in whole or in part "whenever for any reason the Contracting Officer shall determine any such termination is for the best interests of the Government" (App. 15). This clause confers a very broad discretion on the contracting officer, and his finding that termination of the contract is for the best interests of the Government (assuming *arguendo* that it is subject to any judicial review) must be accepted as final and conclusive unless shown to be "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to

imply bad faith, or is not supported by substantial evidence" (41 U. S. C. 321).[5]

The District Court allowed petitioner to reopen the trial to present his claim that the termination of the contract was not valid. After hearing extensive testimony by petitioner and considering the exhibits which he introduced, the court concluded that there had been no showing that the action of the Government was invalid for any of the reasons which would justify a court to set aside the decision made by appropriate authorities in the Department of the Navy. The Court of Appeals concluded that "the trial judge went fully into this matter and found that the action terminating the contract was taken in good faith and for proper reasons; and we are bound by this finding, as we would not be justified on the record in holding it to be clearly erroneous" (Pet. 84).

No purpose would be served by reviewing in detail here the evidence of record which led the Government to its decision. The sum of it is that the petitioner and the Navy were not able to agree on the scope of the interim project necessitated by budget

[5] 41 U. S. C. 321 (1952 ed., Supp. III) provides:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

limitations, and their negotiations in this regard later broke down into several areas of specific disagreement. When it became apparent that an understanding satisfactory to both parties could not be reached, the contract was terminated for the best interests of the Government (R. 94). At best, petitioner's claim is that the contracting officer made a mistake in not going ahead with the project. But the wisdom or correctness of that decision is, of course, not a matter properly within the province of a reviewing court.[6]

3. Petitioner's complaint with respect to the District Court's determination of the amount still owed to him under the contract does not warrant review by this Court. Obviously, the question is not of importance beyond the facts of this case. Furthermore, we believe that if the District Court erred at all, it erred in petitioner's favor in determining that he was entitled to be paid an amount in excess of the termination costs allowed by the contracting officer. Such costs were allowed for a period of seven months beyond the termination of the contract, and under Article 23 (d) (1) (App. 16) the contractor is entitled only to those termination costs approved by the contracting officer, provided his approval is not unreasonably withheld. The Court of Appeals did not

[6] And see *Ordnance Engineering Corp.* v. *United States*, 68 C. Cl. 301, 335: "A court would not be justified in indulging the inference that responsible officers of the Government arbitrarily invaded plaintiff's contractual rights and exercised a reserved right to cancel a contract because of personal animosity toward the contractor, unless the proof adduced to sustain the charge is extremely clear and free from irreconcilable conflicts."

even consider that petitioner's contention in this regard merited serious discussion.

4. Finally, petitioner asserts that the denial of his motion for a "mistrial" was error which should be reviewed by this Court.[7] Again, we believe such review is unwarranted because of the factual nature of the question and its lack of general importance. Moreover, we believe that the denial of this motion was an exercise of sound discretion by the district court. Petitioner was afforded a full opportunity to support this motion before the same judge who presided at the trial. The pertinent exhibits and documents were examined, petitioner's witnesses were called, and his arguments were heard (R. 22). The District Judge was able to observe at first hand the caliber of legal assistance which petitioner was receiving and concluded that his charge of inadequate representation was "entirely unwarranted by the facts" (*ibid.*). With respect to petitioner's charges that certain government exhibits were grossly erroneous or fictitious, the court stated that the discrepancies noted by petitioner presented no evidence of fraud and in any event were not sufficiently material to alter the court's findings (R. 23). Petitioner's

[7] While petitioner's motion was labeled a motion for a "mistrial," we assume it should be treated as a motion for relief from a final judgment under Rule 60 (b) of the Federal Rules of Civil Procedure. The motion having been made more than 10 days after entry of the final decree, it cannot be considered a motion for a new trial under Rule 59, and a Rule 60 (b) motion is the only other procedure available for the relief which petitioner seeks. See 6 Moore, *Federal Practice*, par. 59.09 [3] (2d ed. 1953).

claim of newly discovered evidence provided no reason for setting aside the judgment since they would not be of substantial help to his cause and were known to his counsel well before the case was terminated (R. 22–23).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
Solicitor General.
George Cochran Doub,
Assistant Attorney General.
Samuel D. Slade,
Bernard Cedarbaum,
Attorneys.

March 1957.

APPENDIX

1. Article 17 of the contract provides:

> (a) The Contractor shall submit to the Chief of the Bureau of Ordnance from time to time, as requested, progress reports in triplicate making full disclosure of all work done and the results thereof, provided that the Contractor shall not be required to submit reports more frequently than once each month during the term of the contract. The Chief of the Bureau of Ordnance, or his duly authorized representatives shall at all reasonable times have full access to the work being performed under this contract.
>
> (b) At the completion of the task, or at the termination thereof, if not complete, the Contractor will submit a complete report in triplicate of all work done and the results thereof, together with working drawings and specifications of such prototypes, if any, as may have been developed.

2. Article 23 of the contract provides in pertinent part:

> (a) *Notice of Termination of Contractor's Right to Proceed.* The performance of work under this contract may be terminated by the Government in whole, or from time to time in part, whenever for any reason the Contracting Officer shall determine any such termination is for the best interests of the Government. Termination of work hereunder shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract shall be terminated and the date upon which such termination shall become effective.

(b) * * * After receipt of a Notice of Termination and except as otherwise directed by the Contracting Officer, the Contractor shall * * * (6) transfer title (to the extent that title has not already been transferred) and deliver to the Government in the manner, to the extent and at the times directed by the Contracting Officer * * * (ii) the plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government * * *

* * * * *

(d) In the event of the failure of the Contractor and Contracting Officer to agree as provided in paragraph (c) upon the whole amount to be paid to the Contractor in connection with the termination of work pursuant to this Article, the Government, but without duplication of any amounts agreed upon in accordance with paragraph (c), shall pay to the Contractor the following amounts:

(1) All costs and expenses reimbursable in accordance with this contract, not previously paid to the Contractor for the performance of this contract prior to the effective date of the Notice of Termination and such of these costs as may continue for a reasonable time thereafter with the approval of or as directed by the Contracting Officer (which approval shall not be unreasonably withheld) provided, however, that the Contractor shall proceed as rapidly as practicable to discontinue such costs.

* * * * *

3. Schedule A of the contract provides in pertinent part:

* * * * *

(f) A set of reproducible drawings, prepared to Bureau of Ordnance specifications, for all the equipments developed under this contract will be supplied to the Department of the Navy. Appropriate operating instructions will also be supplied.

4. The patents section of the contract provides in pertinent part:

* * * * *

(b) Contractor agrees to and does hereby grant to the Government an irrevocable, non-exclusive, non-transferable and royalty-free license to practice, and cause to be practiced for the Government, throughout the world, each Subject Invention in the manufacture, use and disposition according to law of any article or material, and the use of any method; provided, however, (i) that as respects any Subject Invention made by Technical Personnel employed by or under contract with the Contractor prior to the date of this contract, whom Contractor has in good faith endeavored to bring under agreement to pass, or giving Contractor the right to pass, to the Government the rights herein provided, and as respects any Subject Invention made by others than Technical Personnel, and as respects the practice of any Subject Invention in foreign countries, the said license and other rights hereinafter provided shall be to the extent of Contractor's right to grant the same; (ii) that nothing contained in this sentence shall be deemed to grant license under Contractor's Patent Rights; and, (iii) that with respect to any subcontract hereunder, Contractor's obligations under this article will be discharged upon its including in such subcontract a patent rights article not less favorable to the Government than as herein provided.

(c) Contractor agrees (i) to deliver to the Contracting Officer or his designee, promptly and in any event prior to final settlement, a complete written disclosure of each Subject Invention which reasonably appears to be patentable, and as to each such invention, to exert its best efforts to effect such delivery within six months after first publication, public use or sale; * * * (iii) to furnish to the Contracting

Officer or his designee, on request, copies or an irrevocable power to inspect and make copies of each patent application filed by or on behalf of the Contractor covering any Subject Invention; * * *

(d) Contractor agrees to and does hereby grant to the Government to the full extent of Contractor's right to do so, the right to reproduce, use and disclose for any governmental purpose, all or any part of the reports, drawings, blueprints, data and technical information to be delivered by Contractor to the Government under this contract; * * *.

MAR 18 1957

U. S. GOVERNMENT PRINTING OFFICE: 1957

MAR 18 1957
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

Donald M. Jacobs, doing business as THE JACOBS INSTRUMENT COMPANY, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

October Term, 1956
No. 752

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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1. Comments on Respondent's statement of "Questions Presented".

The petitioner has presented 12 questions to the Supreme Court for review. The respondent, in its Brief in Opposition, has replaced these questions with four of its own. The respondent's four questions cannot be accepted as reasonable substitutes for the questions presented by the petitioner, for they are inaccurate in factual content, and do not cover the topics covered by the petitioner's questions. Some important questions posed by the petitioner reach into areas which are not even remotely suggested by the respondent's questions. The petitioner categorically denies the validity of the questions posed by the respondent.

The petitioner has filed with this Court a Motion Ne Recipiatur, urging that the respondent's Brief in Opposition not be received because it is not responsive to the questions and issues presented in the original Petition. However, in spite of this motion, the petitioner feels that certain statements made in the Brief in Opposition call for comment, and such comment is offered herein.

2. Comments on Respondent's "Statement".

The Government's Statement opens with the sentence (Br. 2), "In April 1949, the United States entered into a research and development contract with the petitioner . . ." The statement that this was a "research and development contract" is inaccurate, and is important to this case. A research and development contract is one whose object is the performance of research for the general pursuit of knowledge. Such contracts are entered into by the Government either for the express purpose of obtaining the results of research into certain subjects, or to educate the research organization in a specified field which is of interest to the Govern-

ment. The contract may, or may not, call for disclosure of research results in its Schedule (see statement by Attorney General on this subject, Pet. 68). The instant contract was entered into after the petitioner had conceived a new type of bombing system (electronic bombsight) and performed the initial engineering on it, all at his own expense. The task assigned in the Schedule of the contract was: "Conduct research in connection with, develop, design, construct and test a (deleted) bombing system incorporating the JAINCO ground and airborne position determining elements." (The JAINCO equipment was a precision navigational system conceived by the petitioner, and obtained its name from The JAcobs INstrument COmpany). It is to be noted that the contract had as its object the construction and test of a bombing system based on the petitioner's navigational system. It is further to be noted that the instant contract reserved all rights in this system to the petitioner by a clause which states:

> "The inventions described in Patent Application No. 60,731, filed on 18 November 1948 by Donald H. Jacobs, and entitled "Position Finding and Distance Measuring Systems", shall not be considered as Subject Inventions under this contract. The expression "Contractor's Patent Rights" will be understood to include all rights the Contractor has to the aforementioned Patent Application and to any Patent or Patents which may be issued based upon disclosures made in the aforementioned Patent Application."

Hence it is clear that this was a contract for the design and construction of a bombing system. It is true that a good deal of research and development work had to be performed in order to approach the goal stated in the contract, but this was incidental to the task assigned by the contract. The significance of this is that some disclosure of technical data is sometimes made in research contracts, but only very rarely with design contracts. Whatever disclosure is intended is specified in the Schedule, for all these research and design contracts have identical boiler plates according to Government testimony in this case. As a matter of fact, even when the highest degree of disclosure is required by the Schedule, this consists of periodic progress reports plus a final report. The contract never provides for the pillaging of the files of the contractor. The specific disclosure required by the Schedule in the instant contract will be discussed, infra.

The respondent's brief states (Br. 2-3), "The termination was prompted by the inability of the parties to reach agreement with respect to several non-technical matters during the course of negotiations for curtailing the original scope of the contract because of budgetary limitations." This is the same assertion used by the

Dept. of Justice before the Court of Appeals. The interesting thing about it is that it is completely at variance with the sworn testimony of the Navy, given during the trial. The Navy's story was thoroughly exploded by evidence introduced by the petitioner, and the Dept. of Justice has now, after the trial, evolved a completely new story. The facts and evidence bearing on this matter are reviewed in the Petition, pp. 31-43.

The respondent states (Br. 3) that "In the letter of termination the Government called for the return to it of . . . a master index of drawings, and various drawings, notebooks, memos, and studies . . .". (Emphasis added) By the use of the word "return" the respondent seeks to imply that this was property that was loaned to the petitioner by the Government. This is not correct. All the technical data at issue was the property of the petitioner, purchased and generated by him.

The respondent states (Br. 3), "Negotiations for settlement of these questions continued, and the Government paid monthly termination costs until February 25, 1954, when the contracting officer notified the petitioner that such costs would no longer be allowable and reimburseable. The suit was then instituted . . .". Actually, the Government first cut off termination costs on February 25, 1954, then entered into discussions concerning settlement of property matters in March 1954, and filed suit in June 1954.

The respondent states (Br. 3) that the first three counterclaims related to costs of protection and storage of property and data. This is inaccurate, for these counterclaims referred to the costs incurred in carrying out all obligations laid upon the petitioner by the contract, and include numerous administrative and related costs. All costs involved in these counterclaims are allowable under the terms of the contract.

The respondent asserts (Br. 4) that ". . the court held . . . that petitioner's second defense, that the termination of the contract was invalid, should be flatly rejected . ." While it is true that the District Court rejected this defense, the use of the adjective "flatly" is a decided exaggeration. Actually, the Judge stated (R. 127) ". . I do not mean for a minute to belittle or to question Mr. Jacobs' entire good faith in this matter." and (R. 127) ". . . I know how frustrating it can be to get into a situation where a government department, and particularly

the military branches of the government, maneuvers a person into the sort of situation in which Mr. Jacobs found himself." and (R. 116) "If it were purely a scientific matter, I think any person on the evidence here would have to agree that Mr. Jacobs is right . . .". and (R. 117) "We have a system here (i. e., in the U. S.) which has been built up over the years, and no one would claim that its principal purpose or virtue is efficiency." and ". . . I certainly do think it could have been handled in a much wiser way from the very beginning by the Navy." and ". . I am very sympathetic with Mr. Jacobs position and his desire to do a good job and with his feeling that what was proposed was so poor compared with what he might do that he had to fight to the last minute to have the government adopt the better program."

Finally, the Judge stated (R. 130-1),

> "I do not think you can say that Mr. Jacobs' fears were unfounded or improper. There were people who came to him from business who said things, some of which I think are admissible in evidence and some of which are not, from which you could draw inferences that some people in the government's employ were deciding questions or were pressing matters on improper grounds; but I think there is no basis for the Court to find that the final decision in this case was made on any such basis."

Later, at a hearing on a motion for a new trial, the petitioner introduced new evidence, which had just come into his possession, that showed conclusively that the termination was linked directly with his rejection of the Navy's violent attempts to force him into a giveaway merger. This was admitted by the District Judge, who then took the position that the termination was proper punishment for the petitioner's "intransigence" in refusing to give away the entire fruits of his professional career.

The respondent's description of the issues raised by the petitioner in his appeal to the Court of Appeals (Br. 5) is inaccurate in the same way that the respondent's statement of the "Questions Presented" is inaccurate: the issues, and their scope and significance are not properly stated. The issues raised by the petitioner in the Court of Appeals were the same as the issues presented by him to this Honorable Court for resolution, and the questions presented by the respondent are only tenuously related to these.

3. Comments on Respondent's Argument.

The respondent's argument is responsive only to the fictitious questions presented by the respondent, and is not responsive to the questions raised by the

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petitioner. The respondent argues (Br. 6) that its fictitious questions "relate solely to a determination of certain rights of the parties under the contract here involved and to the factual circumstances surrounding the termination of the contract by the Government." The petitioner will not waste time arguing the merits of fictitious questions which have not been properly raised, and are not before the Court for consideration. The questions raised by the petitioner involve extremely important issues of Constitutional Law. The petitioner has been assured by legal representatives of the Aircraft Industries Association, the National Association of Manufacturers, the National Security Industrial Association, and the Automobile Manufacturers Association that issues raised by him are of the greatest concern to them, for their interests are directly threatened by the actions of the courts below in this case.

Specifically, the questions raised by the petitioner fall into the category of Rule 19 (1)(b), "Where a court of appeals has . . . decided an important question of federal law which has not been, but should be, settled by this court; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

While the petitioner will not argue the merits of the respondent's fictitious questions, he will discuss the statements made by the respondent in his argument.

The respondent quotes a statement of the District Judge (Br. 6) that the provisions of the instant contract "undoubtedly give the Government the right to examine, study, copy, photograph, and use all of the writings, for any purpose covered by the contract". The Judge, however, was never able to point to any contract clause or clauses in support of this statement, for there are none. Early in the proceedings in the District Court, the Judge stated, after studying the contract closely, that nothing in it gave the Government any right to the relief sought. It was only after the Government made strong assertions of need of the relief sought that the Judge made the assertion quoted by the respondent, although he never indicated the clause of the contract on which he relied. The Court of Appeals relied solely on the Termination Article, 23(b)(6), which is quoted on p. 84 of the Petition, and which obviously does not grant the relief sought by the

Government. The Court of Appeals clearly felt that the contract did not justify this relief, for it attempted to shore up its position by asserting, "Furthermore, it is clear that, without regard to the contract, the government is entitled to the benefit of all knowledge gained by the contractor in the course of the research for which the government was paying him." (Pet. 84). This statement has been challenged in one of the questions presented by the petitioner.

With respect to the instant contract, it is pointed out that, like all government development contracts, it consists of two parts: a Schedule and a "boiler plate". The Schedule outlines the specific task assigned the contractor, and the boiler plate contains the standard contract clauses common to all such contracts. The Government's contract expert testified, during the trial of this case, that the boiler plate in the instant contract was the same as those issued to all other organizations engaged in this type of work. The boiler plate clauses have been in use for many years, but the Government has never before attempted to distort them so as to demand either voluntary delivery or involuntary seizure of technical data. That is the reason this case is without precedent. If these clauses do actually justify the seizure of technical data, the Government has been remiss for many years in its dealings with all its contractors, and is currently remiss in its dealings with its big-business contractors.

A specific example of the working of the standard boiler plate is given by Contract NOrd-10471, which was a contract between the Navy and the petitioner which was completed prior to the instant contract. This contract had the same boiler plate as the instant contract. Yet during the entire duration of Contract NOrd-10471, no disclosure was demanded of the petitioner, who did, however, voluntarily provide the Navy with some memoranda from his files, exactly as in the instant case. The Navy was overjoyed at receiving these memoranda, and clearly felt that the petitioner had more than fulfilled his requirements for technical disclosure.

With respect to the specific disclosure of technical data demanded by the Schedule of the instant contract, it is pointed out that the Schedule contains the following sentence:

> "A set of reproducible drawings, prepared to Bureau of Ordnance specifications, for all the equipments developed under this contract will be supplied to the Department of the Navy."

This clause could have been carried out in either of two ways. Such drawings could have been prepared by a large staff of draftsmen during the progress of the work, and the drawings could have been continually modified, as the bombing system progressed through various evolutionary stages, until the end of the project at which time a set of drawings would have been ready. This, however, would have been a costly way of carrying out this assignment, for it would have involved the full-time efforts of a large staff of draftsmen during the entire period of performance of the work. However, no funds were ever allocated for such a staff. Instead, another and more sensible method of carrying out this clause was agreed upon by the Navy and the petitioner. This agreement provided that none of these drawings would be prepared until the equipment was in final form, and then a single set of final drawings would be made. However, the contract was terminated by the Navy before the equipment was brought to its final form, so preparation of these drawings was never started. (The drawings in dispute in this action are confidential company working drawings, and are not "prepared to Bureau of Ordnance specifications", and the Navy has never claimed that these company drawings had any relationship to the drawings called for in the Schedule).

Because the Termination Article of the contract calls for the delivery, at termination, of "the plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government", the petitioner offered at the time of termination to prepare a complete set of drawings, of all equipment developed under the contract, for the Navy (R. 32-33). This offer was rejected by the Navy (R. 32-33).

Turning now to the boiler plate clauses, it is noted that the respondent alleges (Br. 7) that pertinent contract provisions are reprinted "in full" in the Appendix to its Brief. This is obviously incorrect, for the provision of the patent article which eliminates the contractor's JAINCO navigational system from the working of various provisions of that article has been thoughtfully deleted. That clause has already been quoted, supra (p. 2).

The respondent's brief quotes (Br. 7) Article 17(a), which relates to disclosure of technical data during the performance of the contract, and Article 17(b), which relates to post-termination disclosure. Article 17(a) was obviously cut off

by the termination of the contract by the Navy. The clearest statement as to the working of that article was provided by the Chief of the Bureau of Ordnance, who officially informed a Senate committee, shortly after termination (Def. Ex. 21), as follows:

> "It should be noted, however, that while the research and development contract called for drawings prepared to Bureau of Ordnance specifications and progress reports, from time to time, making full disclosure of all work done and the results thereof, the Bureau of Ordnance, realizing the limited number of the personnel of the company and the time and cost involved in preparing such in customary form, accepted selected company working memoranda for files in lieu thereof from time to time." (Emphasis added).

There is no doubt but that the petitioner carried out his obligations under Article 17(a) to the full satisfaction of all concerned during the working of the contract. This point will be discussed further, infra. It is also to be borne in mind that there existed a specific covenant that no attempt would be made by the Government to gain access to technical information in the company's files, either that generated under the contract or that generated prior to the contract or in connection with non-contract work. This covenant was strictly observed by the Government until the time of termination was approached.

The contract clause which relates to post-termination disclosure is Article 17(b), which obligates the contractor to submit a report of the work done under the contract and "working drawings and specifications of such prototypes, if any, as may have been developed." Because of this the petitioner offered the Navy its choice of (a) a summary report or (b) a longer report with some drawings, or (c) a longer report with drawings of all equipment built (R. 32-33). The Navy chose the summary report (R. 32-33), and rejected the offer of a longer report and also rejected the offer of the petitioner to prepare drawings for the Navy, and it now has the effrontery to try to pilfer the contents of the petitioner's files on the theory that the petitioner did not live up completely to his contract obligations! The summary report which was actually delivered was 200 typewritten pages in length, and was pronounced by the cognizant Government representative to be more than was expected.

In its Brief, the Government cites portions of the Patent Article of the contract (Br. 8), although a major portion of the work done under the contract was excluded from the working of that article by the contract provision specified

earlier, and in any event, the working of the article is, for the most part, concerned with patent licensing, which has no relationship to technical disclosure. The article does call, however, for a disclosure of patentable inventions. This requirement, however, cannot be used to justify the decrees, for the decrees, by their express terms, do not act to relieve the petitioner of this responsibility. This is discussed further, infra. There is one other section of the article that does relate to disclosure, however, and that is the section which gives to the Government "the right to reproduce, use and disclose for any governmental purpose, all or any part of the reports, drawings, blueprints, data and technical information to be delivered by Contractor to the Government under this contract; . .". This clause was reasonable enough when applied to the technical data whose delivery was contemplated by the parties when the contract was signed, and which was called for by the contract. But when applied to the mass of technical data in the company files which was seized by the Government under the decrees of the District Court, it is horrifying indeed, for it gives the Government a license to use these data "for any governmental purpose". [illegible] outrageous about the contract clause itself, but when that clause is combined with the decrees at issue, the result is outrageous indeed. The difficulty arises, of course, not from the contract clause, but from the decrees.

The Government apparently agrees that none of the contract clauses grant the relief sought by the Government, but takes the position that they must be "read together" (Br. 8)! In other words, the respondent admits that the contract does not authorize the relief it desires, but feels that it implies some sort of philosophical justification for this relief. If the Government wants this dispute settled on the grounds of philosophical justice, the petitioner has a number of such measures of relief he could seek, too. As for reading the contract clauses together, the respondent does not point out what mystic effect this is supposed to produce over reading them in sequence.

The Government also seeks to justify the relief sought by arguing (Br. 8) that "there is no provision in the contract in any way limiting the disclosure to be made to the Government in the event of termination . .". Aside from the legal weakness of this argument, there is the clear and obvious point that the amount of

disclosure to be made after termination was the subject of negotiation and a final agreement, all of which was in writing, and which appears in the Record at pp. 32-34. The petitioner lived up to his end of this formal agreement in all respects, but is still trying, via his counterclaims, to get reimbursement from the respondent for the costs incurred in carrying out this agreement. He received not one cent of fee for this work.

The respondent incorrectly alleges (Br. 9) that upon termination the Government did not insist on a final report but agreed "at the petitioner's proposal", to allow him to submit a summary of work accomplished. As the record shows, the Government elected (R. 32-34) to select the shortest of three possible lengths of report proffered by the petitioner. And this report was some 200 typewritten pages in length and was exceedingly detailed and clear, and it was accepted (R. 40). In addition the petitioner voluntarily turned over some 1,000 of his confidential company working drawings to aid the respondent in carrying on the project, although he was not obligated to do so.

The respondent alleges (Br. 9) that the Government's election of the shorter report was a "concession to the contractor's lack of facilities and lack of personnel." This statement is without foundation in fact. The respondent, after making it, immediately contradicts it (Br. 9) by asserting that the Government's election of the shorter report was based on its assumption that it would be given access to the petitioner's technical data files, and hence it did not need a longer report. This statement is also clearly erroneous, for during the preparation of the report the petitioner informed the Government that it would not be given access to his technical data files. In spite of this, he was not requested to prepare a longer report, as he had offered to do.

The respondent alleges (Br. 9) that the petitioner testified that the report submitted "would not give a working knowledge of the system without supporting data". This is not true. The petitioner testified fully concerning the report submitted, and took the position that it was full and complete, and gave a good working knowledge of the system, and could be fully and perfectly understood without supporting data. On the other hand, he did not claim, and never has claimed, that the report revealed everything that the petitioner had done and learned in connection with the contract, for that would require a tremendously long report, and

such disclosure was not required by the contract. Nor does he claim that the report he submitted discloses everything that he was willing to disclose -- he offered to write longer reports and this offer was rejected. But he does claim that the report submitted was full, complete, and completely understandable without any supporting data, and was received with pleasure by the Navy. The Navy tried to bring pressure to bear on the petitioner, during the preparation of the report, to make it even shorter, and at one time completely cut off the petitioner's monthly reimbursement for expenses in an attempt to force him to hurry work on the report. But he refused to be hurried in spite of the tremendous financial pressure, and insisted on doing a thorough and workmanlike job. This is all clearly stated in the trial testimony. The petitioner desired to have this report presented in evidence, but the Government objected to this on the grounds of security. It seems to the petitioner that it is unfair of the respondent to make false statements concerning a report which was withheld from evidence at the respondent's request.

The respondent alleges that the Government's acceptance of the final report did not relieve the petitioner of his obligations toward disclosure. Yet the Record clearly shows that the petitioner asked the Navy whether the final report would discharge the petitioner of his obligations under the disclosure Article (R. 33), and the Navy replied (R. 34) that the report would discharge the petitioner of his obligations under Article 17 if it covered the topics in an outline which the petitioner showed the Navy. The trial judge read the report and made this finding: "The report was prepared along the lines of the outline submitted to the Government and accepted by the Government." (R. 5). In view of the foregoing facts it is perfectly clear that the petitioner discharged all his obligations under Article 17, and that this has been clearly shown in the Record.

The respondent asserts (Br. 9), "There is nothing harsh or unusual in the result reached." The Government asserts (R. 41) that the bombing system conceived and brought near completion by the petitioner is "necessary and vital to the national defense of the United States." And the cognizant Navy project officer testified that The Jacobs Instrument Company was considered by the Navy, at the time of termination, to be the only company qualified to carry the project through to completion. Yet this company, when it refused to accede to a giveaway merger, had its contract terminated and its research and development organization completely

destroyed by the respondent, who now seeks to seize the contents of the company's files. In all this the respondent insists that "there is nothing harsh or unusual". It apparently all depends on the point of view. We wonder if the respondent would feel the same way if all this had happened to General Motors.

The respondent alleges that the court's decrees protected the petitioner's property rights in its "know-how", and points to a comment of the Court of Appeals to this effect. Specifically, the Court of Appeals said (Pet. 84), "In this connection, it should be noted that the patent rights of the contractor and his rights in non-patentable 'subject inventions' including 'methods of construction, processes of manufacture, construction techniques, trade secrets and other know-how' were protected by the decree . . .". The excerpt from the decree sounds as if it does offer protection until one notes that the Court of Appeals quoted a few words out of the decree without placing them in context. Actually this section of the decree reads (R. 15):

> ". . . the provisions of this paragraph II of this Decree shall not operate in any way . . . to deprive the defendant of any property rights which he may have in non-patentable 'subject inventions' in the form of property rights in and to methods of construction, processes of manufacture, construction techniques, trade secrets, and other know-how except to the extent that plaintiff may have acquired property rights by virtue of Contract NOrd-10531, and to the extent that such property rights may be limited or qualified by the disclosure of documents required by this Paragraph or by the provisions of Article 23(b) and paragraph (d) of the Patent Provisions of Contract NOrd 10531; and provided further that the provisions of this paragraph II of this Decree shall not discharge any of the obligations of the defendant under the Patent Provisions of Contract NOrd 10531, including but not by way of limitation, the obligations of the defendant to grant the United States licenses to patentable inventions, to designate, list and make disclosure to the United States of 'subject inventions' and to grant the United States the power to inspect all patent applications, subject to the proviso contained in paragraph (d) of said Patent Provisions." (Emphasis added).

There are two interesting points with regard to this excerpt. In the first place it is clearly evident that it gives no protection whatever to the defendant's technical data and know-how, for it was the position of the Government and the Court that everything in the defendant's files prepared in connection with or in anticipation of the instant contract was subject to disclosure, and the Government was given the right to search the petitioner's entire plant for technical data. The second point is that this decree expressly does not operate to relieve the petitioner of any obligations for disclosure inherent in the Patent Article. The petitioner is still obligated to make such disclosure as one of the conditions precedent to receiving

the one-third of the counterclaim award (R. 21). Hence the Patent Article cannot be cited as authority for justifying any of the search and seizure which took place under the court's decrees.

The respondent asserts that "the risk that nothing of value would be developed was borne by the Government." This is certainly without foundation in fact. There was actually a joint risk. The Government kept its risk very small by putting money into the contract by small amounts. The contractor, however, devoted the efforts of his organization to this work for five years of Navy contracting, plus nearly a year on its own funds before contracting with the Navy. The Navy work was undertaken with the specific assurance that no attempt would be made to acquire either company-owned technical data, nor that generated under the contract (beyond that specified in the Schedule), and that the company would be given an equitable share of any production that might follow if the work were successful. The Navy obviously is not going to honor its promise with respect to production, and is attempting to violate its promise on technical data in this suit. The contractor was also paid a small fixed fee, but this was converted into a large net loss by the trial court's action in awarding only one-third of the counterclaims (and that third remains unpaid). It is evident that essentially all the risk was borne by the petitioner, who lost all the foregoing, and his research organization and a useful career as well. In addition, he is now being squeezed financially by the Government in other suits.

The respondent asserts (Br. 10) that "the purpose of the contract was the creation of designs and inventions . .". This is not correct. The Mark 6 bombing system had been conceived and invented by the petitioner at his own expense before he did any contracting with the Navy. The purpose of this contract was not basically the "creation of designs and inventions"; it was the bringing into physical existence of a bombing system which had already been invented, as is stated clearly in the Schedule. However the Government was granted a license to the use of all inventions which were developed incidental to this task, and disclosure of such inventions is also provided for in the contract and in the decrees.

The respondent states (Br. 10), "Without the technical data in question, continuing work on the development of a bombing system begun here would be seriously hampered . . .". Both the premise and the conclusion here appear incorrect. From

the time of the termination of the contract (June 1953) until it was relieved of its authority to contract for aircraft fire control equipment early in 1956, the Bureau of Ordnance never showed any interest in the continuation of work on the Mark 6 system, although it was urged to continue this work by the Senate Armed Services Committee and the White House. Responsibility for this type of work has now been transferred to the Bureau of Aeronautics, which also has shown a complete lack of interest in this project. All the interest in the acquisition of the contents of the petitioner's files appears to emanate from certain big corporations. If the Navy had been interested in continuation of the work, it could have been completed years ago. And if the Navy had been interested in acquiring the desired technical data in lawful ways, for honest purposes, it could have acquired these data a long time ago. And these facts are well known to the respondent and the respondent's counsel.

The respondent points out that the findings of the contracting officer regarding the desirability of termination must be accepted, under 41 U.S.C. 321, unless shown to be "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." The

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necessarily to imply bad faith, or is not supported by substantial evidence." The petitioner particularly calls the court's attention to the last of these requirements.

The respondent quotes the Court of Appeals, on the issue of invalid termination, as stating (Br. 11) that "the trial judge went fully into this matter and found that the action terminating the contract was taken in good faith and for proper reasons . . .". The petitioner questions the statement that "the trial judge went fully into this matter . . ." in view of the fact that the petitioner was required to present his defense on this subject without counsel, without witnesses, and with only two days of preparation. In addition the U. S. Attorney kept making technical objections to the testimony and blocked out large portions of the evidence. The petitioner, being involuntarily without counsel, could not defend himself against these technical objections. Finally even the trial judge misquoted the rules of evidence to the naive defendant in order to suppress vital testimony. It is to be noted that after testimony by the defendant (without supporting witnesses, as requested by him), the trial judge found that the Navy had acted improperly, but professed an inability to see a connection between the improper activities and the

termination of the contract, although they occurred simultaneously. When new evidence, which had just come into his possession, was introduced by the defendant at a hearing on a motion for a new trial, the defendant was able to prove conclusively with Navy documents that there was a direct connection between the improper activities (which related to attempts to force a no-reimbursement merger on the defendant) and the termination. At this point the trial judge admitted the connection between the two, but took the position that the defendant's "intransigence" in refusing to agree to a giveaway merger was a proper reason for termination. The defendant takes issue with this conclusion.

The respondent asserts (Br. 11) that "the petitioner and the Navy were not able to agree on the scope of the interim project necessitated by budget limitations . .". This statement is not factual, as is shown clearly by the trial testimony and evidence. It even directly contradicts the Government's own sworn testimony. The respondent also asserts that the validity of the termination is not within the province of a reviewing court (Br. 12). This assertion appears to be in contradiction to the provisions of 41 U.S.C. 321 (Br. 11).

The respondent quotes (Br. 12) a Court of Claims decision to the effect that a court would not be justified in overturning a contract termination which occurred "because of personal animosity" unless the proof is extremely clear. In the instant case there is no allegation of personal animosity, and the proof as to what actually happened is unquestionably clear.

The respondent argues (Br. 12) that the petitioner's complaint with regard to the determination of the amount of the counterclaims does not warrant review because it is purely a question of fact. Without commenting on the respondent's argument, the petitioner points out that important issues of due process are involved in this determination. The amount of the counterclaims was determined after about one hour of hearing, during the one day of the trial when he was represented by counsel who had withdrawn, and had been forced back into the petitioner's service by the judge.

The respondent claims (Br. 13) that there is no justification for this Court to review the denial of the petitioner's motion for a new trial, for the respondent alleges that this is purely a question of fact, and one lacking in general importance. The petitioner feels that the question is one of due process, and he feels

that justice in the abstract, and the methods employed in the Federal Courts are of great general importance and involve both Constitutional rights and the supervisory power of the Supreme Court over the lower courts. With regard to the caliber of legal assistance received by the petitioner from his counsel, he takes the position that lawyers who withdraw from a defendant's service at the instant they are called upon in Court to present his defense are not properly fulfilling their duty, although the District Judge felt otherwise and would not even grant a continuance for the obtaining of other counsel. This may or may not be reasonably considered to be due process of law: it is a matter on which this Court can reasonably be expected to have an opinion.

The respondent also points out (Br. 13) that the trial judge alleged that the differences between the Government exhibits and correct exhibits were not sufficiently material to alter the court's findings. However, by the time the petitioner was able to get the correct versions before the court, and show the really major inaccuracies contained in them, the court had already signed its decrees, and the decrees had been carried out, and the Court was clearly most reluctant to admit it had erred, and did not wish to be burdened with the problem of correcting the damage it had wrought. Hence during this hearing the court defended its position in a most violent fashion. A much clearer picture of the proceedings can be obtained by reviewing the facts (Pet. 55-58) or the Transcript rather than by reading a few words from the opinion the court rendered from the bench on this occasion.

b. Summary of Contract Points.

The various articles in the contract which relate to technical disclosure have been discussed extensively in the Petition, and in this Brief. The petitioner's position on the various contract clauses can be summarized as follows:

Schedule A

The set of drawings, "prepared to Bureau of Ordnance specifications", called for by this clause was never prepared because of agreement between the petitioner and the Navy that this work would not be initiated until the equipment was in final form, and the contract was terminated by the Navy before the equipment reached that stage. The petitioner's offer (R. 32-33) to prepare drawings after termination (of such equipment as had been developed) was rejected by the Navy (R. 32-33).

Article 17. (Reports of Work)

The defendant fully discharged all obligations under this article, as is clear from the Navy letter of 24 August 1953 (R. 34), by preparing his final report. As the trial judge stated (R. 5), "The report was prepared along the lines of the outline submitted to the Government and accepted by the Government."

Patent Article.

This clause calls for the disclosure of all patentable inventions developed under the contract. However, the decrees under review expressly state that they do not relieve the petitioner of his obligations under this clause (R. 15), and the petitioner is required to discharge those obligations as one condition precedent to his obtaining the counterclaim aware (R. 21). Hence the patent article cannot be used as justification for search and seizure of technical data.

Article 23. (Termination by the Government)

This article requires the contractor to deliver, after termination, ". . the plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government." This relates back to the requirements under Schedule A. However, the petitioner's offer to prepare, after termination, the drawings called for by Schedule A and Article 17(b) was rejected by the Navy (R. 32-33).

5. Comments on Property Rights.

It is the position of the petitioner that property rights are vested in technical data (see, for example, 42 Am. Juris. 192), and that the technical data in this case are his sole and exclusive property. The respondent takes issue with the latter position, and argues (Br. 10), "The Government seeks only what it paid for, i. e., the results of the research performed under the contract." The respondent's argument is apparently based on the fact that the Government reimbursed the petitioner for some of the costs of performance of the contract. However, this reimbursement is specifically stated by Article 5(a) of the contract to be part of the compensation which was to be paid the petitioner for the performance of the task assigned by the contract. The question, then, is: does the government own property purchased by the petitioner with his compensation for

his work? The government's theory that it does own this property is based on a doctrine which has been described as "once a government dollar, always a government dollar." Under this doctrine the house and furnishing purchased by a Government employee with his salary are the property of the Government. The theory obviously has legal weakness and evil implications.

6. Conclusion.

In view of the matters discussed herein and in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Donald H. Jacobs

15 March 1957

JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

Donald H. Jacobs, doing business as THE JACOBS INSTRUMENT COMPANY, Petitioner	:	
v.	:	October Term, 1956 No. 752
THE UNITED STATES OF AMERICA, Respondent	:	

On Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Fourth Circuit

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MOTION TO PROCEED ON TYPEWRITTEN MATERIAL

The petitioner herein again moves for permission to proceed on typewritten material, and as a basis for his proceedi[illegible] makes the following allegations:

1. On 31 January 1957 the petitioner herein mailed a motion to proceed on typewritten or similar matter to this Court. This motion was granted on 25 March 1957.

2. The petition for certiorari filed herein was denied on 25 March 1957, and the petitioner therefore had until 19 April 1957 to file a petition for rehearing. This petition for rehearing was prepared in typewritten form under the authority which the petitioner understood to have been granted under the circumstances outlined in the preceding paragraph. The said petition for rehearing was mailed to this Court on 15 April 1957.

3. On 17 April 1957 the petitioner received a telephonic communication from the office of the Court Clerk in which he was advised that the earlier grant of permission to proceed on typewritten material did not extend to a petition for rehearing, and that this petition must be printed or a new motion for permission to proceed on typewritten material would have to be filed. Inasmuch as this information was received too close to the cut-off date for serious contemplation of the problems involved in printing the petition for rehearing, the petitioner moves the Court for permission to file the petition for rehearing in typewritten form.

Donald H. Jacobs

18 April 1957

I HEREBY CERTIFY that a copy of the above motion has been served on the United States by the mailing of a copy thereof, with first class postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., on 18 April 1957.

Donald H. Jacobs

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IN THE SUPREME COURT OF THE UNITED STATES

APR 19 1957
JOHN T. FEY, Clerk

Donald E. Jacobs, doing business as THE JACOBS INSTRUMENT COMPANY, Petitioner	
v.	October Term, 1956 No. 752
THE UNITED STATES OF AMERICA, Respondent	

On Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Fourth Circuit

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PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

The petitioner respectfully prays for a rehearing on his petition for a writ of certiorari, and as a basis for this petition makes the following allegations:

1. The petition for a writ of certiorari was denied in an order dated March 25, 1957. In a letter dated March 26, 1957, the petitioner was advised by the Clerk of this Court that Justice Whittaker took no part in the consideration or decision of this matter. Hence the petitioner had a reduced opportunity to obtain the required four votes for certiorari. Reconsideration at this time would presumably increase his chances of obtaining the necessary four affirmative votes.

2. The contract clauses in dispute in this action are not restricted to the contract between the petitioner and the Government, but are common "boiler plate" clauses which are incorporated, by virtue of the Armed Services Procurement Regulation, in nearly all design and research contracts. The decisions of the courts below make a radically new interpretation of these clauses -- an interpretation which has not only had extremely serious consequences for the petitioner but which will have a like effect on other firms in the area field.

3. The opinion of the Court of Appeals, holding that regardless of the contract terms, anything done by a Government contractor belongs to the Government, is a most violent departure from current practice, and violates legal and equitable considerations. It is certainly going to have a disastrous effect on Government contracting, for it will cause much harm both to the Government and to its contractors.

WHEREFORE, the petitioner prays that his petition for a writ of certiorari be reconsidered, and that the petition be granted.

Donald E. Jacobs

15 April 1957

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CERTIFICATE

The petitioner certifies that this petition is presented in good faith, and is not intended for delay -- the mandate in this case has already issued. He further certifies that this petition for rehearing is restricted to the grounds above specified.

15 April 1971

Donald H. Jacobs